

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-0182-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM PROCELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J. Fine and Schudson, JJ.

PER CURIAM. Adam Procell appeals from a judgment of conviction for first-degree intentional homicide, party to a crime, in violation of §§ 940.01(1), and 939.05 STATS., and for attempted first-degree intentional homicide, party to a crime, in violation of §§ 940.01(1), 939.32, and 939.05, STATS. The trial court sentenced Procell on the first conviction to mandatory life

imprisonment with parole eligibility in the year 2022. On the second conviction, it sentenced him to twenty-five years' imprisonment concurrent to the first sentence. Procell moved for reduction of his sentence. By order, the trial court denied the motion without a hearing, concluding that Procell failed to set forth any new factor warranting sentence modification and that the sentence was not unduly harsh or excessive based on the nature of the offense, Procell's rehabilitative needs, and the need for community protection.

Procell raises two issues: (1) whether the evidence of intent in both counts, as to himself and his accomplice, was insufficient to sustain the verdicts; and (2) whether the trial court erroneously exercised its sentencing discretion in failing to reduce his sentence. Because the evidence was sufficient to convict, and because the sentencing court properly exercised its sentencing discretion in denying Procell's motion to reduce his sentence, we affirm.

I. BACKGROUND

To gain an understanding of the circumstances that led to this tragedy, we look to essentially undisputed evidence that was received at trial. On September 26, 1995, Procell, a member of the Spanish Cobras, was serving in the capacity of a security guard to protect the gang's neighborhood. Late in the afternoon, a brown van drove into the area carrying passengers who were members of a rival gang. Procell exchanged gang signs with these individuals and, after the van left, asked Richie Zapata, the local leader of the Cobras, for a gun because he believed there was going to be trouble. Zapata supplied Procell with a .380 semi-automatic pistol and told him to use it if the same people returned. Procell had previous experience with semi-automatic pistols. He loaded the gun and hid it nearby and then continued his assignment as security guard.

Victor Cruz, Procell's accomplice, soon appeared on the scene. He engaged Zapata in conversation while Procell stood nearby. At approximately 6 p.m., Robert Bruce, the homicide victim, Marvin Nororis, the attempted homicide victim, and Ernie Garcia arrived in a blue car at 902 South 21st Street, Milwaukee, to pick up Fernando Garcia to play basketball. Bruce drove past Zapata in order to enter a driveway leading to Garcia's residence. Bruce parked the car toward the back of the driveway. Someone in Zapata's group recognized that passengers in the blue car were members of the rival gang, the Mexican Syndicate or "MS". Procell, Cruz and Zapata stood near the entrance of the driveway. One of them asked whether any of the passengers was a member of the "MS". When Bruce responded affirmatively, Cruz began firing his 9mm, followed by Procell with his .380. Both guns were semi-automatic pistols.

Bruce was shot in the right upper back with the bullet exiting from the right neck area. He bled to death. Nororis, the other victim, was struck in the right thigh and survived. No bullets were recovered from the bodies of either victim. Initially, the State filed a delinquency petition against Procell, but he was waived into adult court and subsequently charged in a criminal information with the homicide counts. Other evidence of record that directly relates to our analysis of the issues will be set forth when appropriate.

II. DISCUSSION

A. SUFFICIENCY OF EVIDENCE

Procell's first claim of error is two-fold. He first asserts there was insufficient evidence to demonstrate that he, as the direct perpetrator, had the intent to kill either victim. Second, to avoid the implications of party to a crime

liability, he claims there is insufficient evidence to show that his accomplice, Cruz, intended to kill either victim.

The standard for reviewing the sufficiency of the evidence to support a conviction is the same in either a direct or circumstantial evidence case. *See State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). In reviewing the sufficiency of evidence to support a conviction, we may not substitute our judgment for that of the trier of fact unless “the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *Id.* If any possibility exists that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, we may not overturn a verdict even if we believe that the jury should not have found guilt based on the evidence before it. *See id.* at 506-07, 451 N.W.2d at 757.

Procell contends that the evidence was insufficient to prove that either he or Cruz had the intent to kill, which was required to convict him of first-degree intentional homicide or attempted first-degree intentional homicide. He argues that neither his actions nor his words before, during, or after the incident form a basis to establish intent to kill. More specifically, he claims that he aimed to the right of the blue car to scare the passengers into believing they were not wanted in the neighborhood. As will be detailed below, we are not convinced.

In both counts, Procell was charged as a party to the crime. The trial court instructed the jury that Procell could be liable for the crimes charged by directly committing them, by intentionally aiding and abetting their commission, or as a party to a conspiracy with another to commit them.

Our review of the trial record discloses the following additional evidence that the jury had to evaluate. Maureen Lavin of the Milwaukee County Medical Examiner's Office performed the autopsy on Bruce. She determined that he suffered a gunshot wound to the right upper back and that the bullet exited from the right side of his neck. No bullet was found in the body. Thus, the source of the wound was not determinable. Detective Richard Weibel testified that he recovered sixteen 9mm shell casings and four .380 automatic shell casings at the crime scene. Detective David Klabunde testified that fragments of .380 bullets were found underneath the tail end of the blue car and in the car itself. Monty Lutz of the Wisconsin State Crime Laboratory testified that all of the 9mm casings were fired from one gun and all of the .380 casings had been fired from another separate gun.

Three citizen witnesses testified for the State: Ana Rosas, Cynthia Mendoza, and Renee Koutsio. Rosas was Cruz's girlfriend. She arrived at the scene with Cruz shortly before the incident and remained in Cruz's car during the shooting. Because of her location in the car she did not witness the shooting, but heard Cruz summon Procell to come across the street where he was standing in the driveway. She heard the shooting and saw Procell leave the scene with a gun in his hand.

Mendoza was a friend of the Cobras and lived across the street from the driveway where the shooting occurred. She observed Zapata coming down off the porch of the house located next to the driveway. Procell was standing nearby. She then saw Cruz pull up in his car in front of the same house, get out, and talk to Zapata. She heard Zapata tell Cruz in Spanish to "get out the cannon!" She observed Procell run across the street toward her house and obtain a gun from under the porch. He then ran back to where Cruz was standing and began firing.

She testified that Procell and Cruz were shooting at the three persons in the blue car, although she admitted that because of her location she could not say where the three individuals were at the time of the shooting. After the shooting, Procell ran back across the street and into her house. Cruz left in his car and Zapata drove off on a bike.

Koutsio also lived across the street from the driveway. Her residence was above Mendoza's. Prior to the incident, she had been out on the front porch. She observed the brown van and the sign exchange that occurred between Procell and the passengers in the van. She testified that the passengers in the van were from a rival gang. After the van left, Procell asked Zapata for a gun. Zapata left and soon returned with a .380, which he gave to Procell. Procell hid the gun near Koutsio's house. In the meantime, Cruz arrived. Procell stood guard at the front of the porch where Zapata was sitting. Soon the blue car arrived and turned into the driveway. Koutsio observed that some of the passengers in the blue car had been in the brown van. She then returned to her residence. Moments later she heard someone yell "MSL8 Killers"; then the shooting began. Based on her experience, Koutsio concluded that the first shots were from a .380 and the continuing firing came from a 9mm. She testified that five or six days later she spoke to Procell while he was staying at a friend's house. Procell said that the first shot he fired hit somebody in the neck and that the three individuals did not return fire or shoot back.

Detective Daniel Phillips testified that he took a statement from Procell at the time of his arrest. He testified that Procell admitted that he was a Cobra and that he recognized the passengers in the blue car as members of MSL8, a rival gang with whom they were "at war." Procell stated that he stood next to Cruz and fired at the rival group that stood thirty-to-forty feet away, as fast as he

could, until he ran out of ammunition or the gun jammed. He fired four times, not at anyone in particular, but to the right side of the blue car just to scare them out of the neighborhood. Procell further admitted that he was experienced with guns and that he recognized the victim from a picture as someone who had shot at him some time earlier.

Procell testified on his own behalf. He said that Zapata was his gang leader and he had to obey his orders at the risk of a “head crack.” He stated that after the brown van drove by, Zapata gave him the .380 and told him to shoot if they came back. He loaded the gun and hid it across the street. When the blue car arrived Zapata told him he better shoot, so he retrieved the gun and, before he came back across the street, the shooting began. He stated he tried to shoot to the right of the blue car, but did not know where the bullets ended up. He denied aiming at anyone or intending to kill. Lastly, he denied ever seeing Koutsio after the shooting.

With this divergent and seemingly contradictory evidence before it, the jury had the task of weighing the testimony of the various witnesses to determine whether there was direct intent, party to a crime liability, or insufficient evidence to meet the burden of proof. From the location of the bullet fragments, Procell’s admission of the effectiveness of his first shot, his collective actions with Cruz at the behest of Zapata, his exposure to an earlier firing by the victim, the self-declared war between his gang and the victims, and the partially corroborative testimony of the State’s three citizen witnesses, there was more than sufficient evidence before the jury to find the existence of intent to commit first-degree homicide, and attempted first-degree homicide, or liability for both under the party to a crime statute. *See* § 939.05, STATS.; *see also State v. Sharlow*, 110 Wis.2d 226, 238-41, 327 N.W.2d 692, 698-99 (1983). Procell’s claim of error fails.

B. SENTENCING DISCRETION

Procell claims the trial court erroneously exercised its discretion in denying his motion to reduce his sentence. He bases his assertion on several factors: (1) the sentencing court's observation that he had no rehabilitative needs that could not be fulfilled within a parole eligibility date of thirteen and one-half years;¹ (2) his young age—15 years; (3) his lack of a prior criminal record and his demonstrated remorse for his actions; (4) his lesser degree of culpability; i.e., he fired only four shots versus the sixteen shots of his accomplice, Cruz; (5) his pre-gang record was one of achievement; and finally (6) the effect of the coercive influence of Zapata, the gang leader.

The scope of our review when it comes to sentences imposed by a trial court is quite restricted. This condition exists because of the strong policy against interference with the discretion of the trial court in passing sentence. *See Voight v. State*, 61 Wis.2d 17, 23, 211 N.W.2d 445, 448 (1973). In reviewing a sentence to determine whether discretion was misused or erroneously exercised, there is a presumption that the trial court acted reasonably and the complainant is required to show some unreasonable or unjustifiable basis in the record for the sentence under review. *See Jung v. State*, 32 Wis.2d 541, 548, 145 N.W.2d 684, 688 (1966). This exercise of discretion contemplates a process of reasoning based on facts that are of record or that are reasonably derived by inference from the record, and a conclusion based on a logical rationale founded upon proper legal standards. *See McCleary v. State*, 49 Wis.2d 263, 277, 182 N.W.2d 512, 519 (1971). The three primary factors which a sentencing court must consider are the

¹ After making this comment at the sentencing hearing, the trial court then proceeded to set the parole eligibility date at 26 years and 3 months.

gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public. See *State v. Sarabia*, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984). The court also may consider other factors set forth in *State v. Borrell*, 167 Wis.2d 749, 773-74, 482 N.W.2d 883, 892 (1992).

The trial court's sentencing statement clearly discloses that it engaged in a correct process. In considering the nature of the offense, it analogized the shooting as "close to an execution" for no discernible reason. It succinctly observed the debilitating effect that such an incident has on a neighborhood, especially when the only rationale for the shooting is the perverse one of protecting one's "turf." It focused considerably on Procell's age and his previous unblemished record. The court concluded that Procell had no needs, except separation from gang affiliation, that could not be met within normal parole release dates. Nevertheless, the court opined that there were other overriding considerations that had to be placed in the sentencing equation: the need of general deterrence was significant even if in the future it only saves one life. The court emphasized the need to spread the word about the implications of party to a crime liability among gang adherents, regardless of who fired how many shots. The trial court clearly considered the proper sentencing factors.

In summary, Procell's claim of error is tied to his disapproval of the emphasis that the court reasonably gave to certain factors that weighed against his interest. This is not a proper basis for reversing the sentencing court and we decline the invitation to do so.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

